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BEFORE THE ARIZONA CORPORATION COMMISSION

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Commissioner

Arizona Corporation Commission

DOCKETED DOCUMENT CONTROL

JAN 20 1999

IN THE MATTER OF THE  
COMPETITION IN THE PROVISION  
OF ELECTRIC SERVICES THROUGHOUT  
THE STATE OF ARIZONA

DOCKETED BY

*pd*

DOCKET NO. RE-00000C-94-0165

### COMMENTS OF ARIZONA PUBLIC SERVICE COMPANY ON PROCEDURAL ISSUES

Arizona Public Service Company ("APS" or "Company") hereby submits the following  
comments on procedural issues requested by the Chief Hearing Officer in his January 6, 1999,  
Procedural Order.

#### SECTION A

#### ISSUES THAT STILL NEED TO BE RESOLVED

APS urges the Commission to promptly resolve the following issues before retail  
competition begins:

1. The determination and recovery of stranded costs;
2. Approval of unbundled rates (including provision for stranded costs) and, if necessary, restructuring of standard offer rates;
3. The level and extent of Rule 1609's Solar Portfolio Standard (*e.g.* it should not be applied to standard offer service, the SPS level must be cost justified, etc.);
4. The precise level of system benefits charges for each Affected Utility (which could be determined in conjunction with unbundled rates), the types of costs to be included, and criteria and procedures for increasing or decreasing the SBC;
5. The specific rate treatment for "must run" generating units and the impact of that treatment on stranded cost levels;

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6. FERC transmission issues (*e.g.* APS cannot file a meaningful FERC retail OAT until ACC unbundled rates are established);
7. The Commission's support of the formation of an ISA/ISO (*e.g.* is an ISA even necessary, how will the Commission support formation of an ISO, etc.);
8. The timing and method of recovery of an Affected Utility's cost of implementing retail competition, including restructuring costs;
9. The acquisition of, and recovery of costs related to, generation required for standard offer service if Affected Utilities are required to divest themselves of all presently owned or contracted-for generation;
10. Approval of the corporate restructuring plans required to separate competitive services under Rule R14-2-1616;
11. Clarification of the extent to which Affected Utilities may provide billing and metering services to ESPs;
12. Approval of ESP service acquisition agreements as contemplated by Rule R14-2-1603;
13. Approval of fees for services associated with direct access protocols;
14. Resolution of A.R.S. § 40-252 issues;
15. Specific waivers from or modifications to the Electric Competition Rules for APS affiliate activities, including those contained in the APS-Staff Settlement Agreement (Section XIV, the pertinent portions of which are attached hereto as **Exhibit A**), and other necessary changes such as revised affiliate pricing, personnel, information sharing, joint activity and compliance audit provisions;
16. Other necessary modifications to the existing Electric Competition Rules, including but not limited to those referred to in APS' December 31, 1998, Application for Rehearing (a portion of which is attached hereto as **Exhibit B**), and revisions regarding competitive CC&Ns, buy throughs, confidentiality of data, etc.;
17. Changes to the Arizona Constitution necessary to recognize the "deregulated" nature of competitive services;
18. Changes to A.R.S. Title 40 or exemptions therefrom necessary to recognize the "deregulated" nature of competitive services and to assure that they are not encumbered by unnecessary or inappropriate regulation;
19. Consistent and coordinated certification of qualified ESPs with pending applications to facilitate the ability of UDCs to respond to requests for service; and
20. Labeling requirements under Rule R14-2-1618.

## SECTION B

### THE ORDER IN WHICH THE ISSUES SHOULD BE RESOLVED

Although the above numerated issues vary in terms of their importance and significance to the Company, all should be resolved, to the extent possible, prior to the initiation of retail competition. The Company does not object to these issues being grouped for sequentially-phased consideration by the Commission, but retail competition should not begin until all issues have been finally decided.

## SECTION C

### THE METHOD (SUCH AS INFORMAL DISCUSSIONS BY PARTIES/HEARINGS/COMBINATIONS/ETC.) AND TIMING TO RESOLVE THE ISSUES IDENTIFIED

With several possible exceptions, all of the issues identified in Section A require some action by the Commission, either by rule making or adjudicative order. Each such action must be taken in accordance with applicable procedural requirements, supported by substantial evidence and be otherwise lawful. In most cases, this may require an evidentiary hearing in accordance with established Commission procedures, without artificial and arbitrary restraints on case presentation (e.g., unreasonable limits on cross examination). Settlement of some issues may be possible and should be encouraged; however, presentation of any such resulting settlement to the Commission must be done in a manner sufficient to allow the Commission to approve the settlement in a lawful manner and without compromising other parties' due process rights. APS believes the Commission can adopt procedures sufficient to resolve the issues identified in Section A by September 1, 1999, and perhaps even earlier if settlement on important issues can be achieved.

## SECTION D

### RESPONSE TO THE JANUARY 4, 1999 JOINT PROPOSAL OF RUCO AND THE ATTORNEY GENERAL

The Company appreciates the efforts of the Attorney General and RUCO to establish a procedural schedule. However, as APS advised both parties prior to the issuance of the January 4,

1 1999, letter, their joint proposal is unworkable or otherwise objectionable in several respects. First,  
2 the proposed procedural schedule only considers unbundled tariffs and stranded costs. It makes no  
3 attempt to provide for the resolution of the many other important issues listed in Section A of this  
4 response.

5 Second, the Company strongly objects to the nebulous concept of "accelerated" hearings  
6 on some type of "interim" unbundled tariffs. Interim tariffs that will soon thereafter be changed will  
7 not provide customers, ESPs or Affected Utilities with the requisite certainty of pricing necessary to  
8 develop a competitive market. The time should be taken now to approve unbundled tariffs on a  
9 "permanent" basis.

10 Third, several of the dates in the proposed procedural schedule (*e.g.*, for issuing an ACC  
11 procedural order and identifying issues) are obviously moot or superseded by the Chief Hearing  
12 Officer's order.

13 Fourth, the proposed procedural schedule assumes that simultaneous closing briefs can be  
14 filed on April 23, 1999, without regard to when the APS hearing actually commences or ends. APS  
15 suggests simultaneous closing briefs be due ten (10) days after the end of any hearing and that  
16 simultaneous reply briefs be allowed ten (10) days after the submission of closing briefs.

17 Fifth, the proposed procedural schedule would automatically and arbitrarily "cut off"  
18 settlement discussions on March 15, 1999. APS believes settlement discussions should continue as  
19 long as they are productive.

20 Finally, APS believes the proposed procedural schedule's date for revisions to the Electric  
21 Competition Rules needs to be better integrated with the individual utility hearings. At this stage, it  
22 is unclear as to the extent to which issues resolved in those hearings should be reflected in the Electric  
23 Competition Rules or *vice versa*. In any event, it would be premature to close the rule making  
24 comment period on February 15, 1999, prior to the time testimony has even been filed in the  
25 individual company cases.  
26

CONCLUSION

APS urges the Commission to establish procedures that will allow the resolution of the many open issues in a just and reasonable manner so that retail competition can begin as promptly as possible. Toward that end, APS looks forward to the opportunity to participate in the January 22, 1999, pre-hearing conference to discuss these matters in more detail.

RESPECTFULLY SUBMITTED this 20th day of January, 1999.

SNELL & WILMER L.L.P.



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Attorneys for Arizona Public Service Company

**CERTIFICATE OF SERVICE**

The original and ten (10) copies of the foregoing document were filed with the Arizona Corporation Commission on this 20th day of January, 1999, and service was completed by mailing or hand-delivering a copy of the foregoing document this 20th day of January, 1999 to all parties of record herein.

  
Sharon Madden

determined by the Commission) and provides dispute resolution such that market participants can expeditiously resolve dispute claims. If an Arizona only ISO is established, it is anticipated that it would join a regional ISO when one is established.

**XI. Section 40-252 – Certificate of Convenience and Necessity**

APS agrees to modify its Certificate(s) of Convenience and Necessity to permit competition pursuant to A.A.C. R14-2-1600, et seq., as amended in August 1998. The order adopting this Settlement Agreement shall constitute the necessary Commission Order modifying APS' CC&Ns to permit competition.

**XII. Resolution of Litigation.**

Upon issuance by the Commission of a final, non-appealable order approving this Agreement, APS shall move to dismiss with prejudice all pending litigation brought by APS against the Commission. As mutually agreed, APS will actively support the Commission's position and assist the Commission in any remaining litigation regarding the Commission's Electric Competition Rules or related matters.

**XIII. Must Run Assets.**

To the extent such contracts are not subject to FERC jurisdiction, contracts regarding the sale of output from must run generation units shall be reviewed and approved by the Commission.

**XIV. Waivers.**

APS has requested waiver of certain Affiliated Interest Rules. Staff concurs with APS' requests for waivers of certain Affiliated Interest Rules, and agrees that the Commission's approval of this Agreement will constitute the Commission's granting of the waivers, under the following conditions and limitations:÷

**R14-2-801(5)**

APS has requested a waiver of the definition of "reorganization" to exclude corporate reorganizations that do not involve a reconfiguration of the utility distribution company ("UDC") in the holding company structure. Under the waiver proposed by APS, the holding company would be free to reorganize, buy or sell non-regulated affiliates without Commission approval. Staff agrees that R14-2-801(5) is waived as applied to APS' non-regulated affiliates to the extent that the UDC is not implicated in any reorganization of the holding company's structure or the non-regulated affiliates' structure. In any reorganization where the UDC is implicated in any manner as to reconfiguration of the holding company's structure or an affiliates' reconfiguration, or if the UDC forms, divests

or reconfigures any of its subsidiaries. Rule R14-2-801(5) is not waived and is applicable to APS (UDC).

R14-2-804(A)

APS has requested a waiver of the rule that requires any affiliate that transacts business with the UDC to open its books and records to Commission review. Staff agrees that R14-2-804(A) may be waived as long as the non-regulated affiliate's books and records reflect transactions with the UDC and are included in the Code of Conduct required by the Electric Competition Rules. By this waiver, the Commission still retains jurisdiction to review and have access to the books and records of affiliates of the UDC for whatever purposes the Commission deems appropriate if the Commission's rate setting jurisdiction is implicated.

R14-2-805(A)

APS has requested waiver of the rule that requires a holding company to file an annual report with respect to diversification plans and the activities of unregulated subsidiaries. The affect of the waiver requested by APS would be to limit the annual filing requirement to the UDC only. Staff agrees that the annual filing under the rule can be limited to the UDC unless the holding company or subsidiary's activities implicate the UDC, and have a likely material adverse affect upon the UDC's financial viability and integrity.

R14-2-805(A)(2)

This Rule requires a specific description of business activities of all affiliates to be filed with the Commission on an annual basis. APS wishes to have a waiver of the Rule and limit disclosure to the nature of the business rather than specific activities. Staff agrees this Rule may be waived to the extent indicated by APS.

R14-2-805(A)(6)

APS seeks a waiver of the disclosure requirement in the annual filing for bases for allocation of all plant revenue expenses to all regulated and unregulated entities in the holding company structure. APS' request limits disclosure to allocations applicable to the UDC. Staff agrees with this waiver to disclosure but reserves the Commission's jurisdiction to receive disclosure of the bases for allocation if necessary in the Commission's determinations in any matter, including but not limited to rate setting matters.



R14-2-805(A)(9), (10) and (11)

APS seeks a waiver of the annual submission of contracts and agreements for transactions between the regulated utility and nonregulated affiliate. Staff agrees to the waiver of this requirement as requested by APS as to the contracts and agreements which are not covered by the Code of Conduct required by the Retail Competition Rules or not subject to FERC approval. However, the Commission reserves the jurisdiction to receive the information that would have been submitted under the rule, if the Commission deems necessary for any purpose including, but not limited to rate setting matters.

**XVI. Implementation of Retail Access.**

Direct access to electric generation suppliers will be phased in for all customers in APS' territory in accordance with A.A.C. R14-2-1604. APS shall determine residential customers eligible for retail access pursuant to the plan filed by APS with the Commission on September 15, 1998. For customers that are 20 kW or smaller at each premise, load profiling will be allowed.

**XVII. Clarification of Services that Must and Can be Offered by APS**

Staff will support amending A.A.C. R14-2-1616.B, as provided in Exhibit D hereto.

**XVIII.- Consideration for Agreement**

The Company's willingness to enter into this Agreement and to withdraw from certain civil actions against the Commission is based upon the Commission's irrevocable promise herein to permit recovery of the Company's regulatory assets and stranded costs as provided herein. Such promise by the Commission shall survive the expiration of the Agreement and shall be specifically enforceable against this and any future Commission.

**MISCELLANEOUS PROVISIONS**

**1. Admissions.**

This Agreement represents an attempt to compromise and settle disputed claims arising out of APS' Applications in a manner consistent with the public interest. Nothing contained in this Agreement is an admission by any of the parties that any of the positions taken, or that might be taken by each in formal proceedings, is unreasonable. In addition, acceptance of this Agreement by the parties is without prejudice to any position taken by any party in these proceedings.

1 RM95-8-000 (March 29, 1995), at 99-100. The Amended Rules clearly assert full Commission  
2 jurisdiction over such agreements despite FERC's assertion of preempting jurisdiction over the  
3 transmission component of "buy-through" transactions.

4  
5 **XVI. THE AMENDED RULES CONSTITUTE AN**  
6 **UNCONSTITUTIONAL BILL OF ATTAINDER**

7 The Amended Rules impose punitive conditions on Affected Utilities, which are a  
8 class of specifically-named public service corporations under the Amended Rules, without  
9 affording Affected Utilities a judicial trial for the regulatory abuses that are conclusively presumed  
10 by the Commission. *See, e.g.*, Rule R14-2-1616 and -1617. Accordingly, the Amended Rules  
11 violate the Bill of Attainder Clause in Article I, § 10 of the United States Constitution and in  
12 Article II, § 25 of the Arizona Constitution.

13 **XVII. THE AMENDED RULES CONTAIN PROVISIONS**  
14 **UPON WHICH APS HAD NO OPPORTUNITY TO COMMENT**  
15 **OR WHICH CONTRADICT STAFF'S POSITIONS IN OTHER**  
16 **COMPETITION-RELATED PROCEEDINGS**

17 Although perhaps not of the same gravity as many of the constitutional or procedural  
18 failings of the Amended Rules identified above, the extent of inconsistencies, contradictions and  
19 drafting problems in the Amended Rules are a further illustration as to why hurried  
20 implementation of the Amended Rules in their present form and on the eve of the competition start  
21 date is not in the public interest. Specifically, the Amended Rules contain new or modified  
22 provisions from the "emergency" rules adopted by Decision No. 61071, provisions which  
23 contradict the position that Staff and/or the Commission has taken in other competition-related  
24 proceedings, or provisions which are mooted by the passage of time and should no longer be  
25 included in the Amended Rules. These new or contradictory provisions include:  
26

1           A.     A.A.C. R14-2-1601(10):

2           The amendment defines Direct Access Service Request ("DASR") to include  
3 requests by the end-user. However, Staff's changes to the Company's proposed Schedule 10,  
4 which were adopted by the Commission, eliminate the possibility of a direct access request by a  
5 end-use customer. Thus, the words "or the customer" should be deleted from the end of the  
6 proposed definition.

7           B.     A.A.C. R14-2-1601(22):

8           "Aggregators" is defined by A.A.C. R14-2-1601(2) such that they are ESPs. Thus,  
9 they can not be both included and excluded from the definition of "Load Serving Entity."  
10 Accordingly, the words "or aggregators" should be deleted from the end of this definition.

11          C.     A.A.C. R-14-2-1603(A):

12          As noted above, Staff's and the Commission's previous changes to the Company's  
13 Schedule 10 effectively eliminate the concept of self-aggregation by requiring that a Self-  
14 Aggregator purchase energy only from a certified ESP. As the ESP would be required to have a  
15 Service Acquisition Agreement with APS, there is no need for the language in this rule that states:  
16 "and self-aggregators are required to negotiate a Service Acquisition Agreement consistent with  
17 subsection G(6)."

18          Second, Meter Service Providers ("MSPs") and Meter Reader Service Providers  
19 ("MRSPs") are also defined as ESPs in the Amended Rules. Although such designation is  
20 generally appropriate, it would be unnecessary to have two service acquisition agreements when  
21 the MSP and/or MRSP is a subcontractor of the load-serving ESP and is covered by the latter's  
22 service acquisition agreement.

23          D.     A.A.C. R14-2-1604(A):

24          The language in the second full sentence to this amendment (allowing 180 days from  
25 the filing of the DASR to the initiation of competitive service) is inconsistent with prior actions of  
26 this Commission and is unreasonably intended to benefit only special contract customers at the

1 expense of all other potentially eligible customers. The proposed language conflicts with the  
2 specific and controlling provisions of APS' Schedule 10, which has been approved by this  
3 Commission.

4 For example, Cyprus Climax Metals ("Cyprus") has a special contract with APS that  
5 expires May 1, 1999. But for the approval of APS' Schedule 10, this amendment could require  
6 APS to reserve some 10-15% of its otherwise eligible load for Cyprus, which would make a  
7 mockery of the concept "first-come, first served." The "180 days" should be replaced by "60  
8 days", which the Commission approved in the Company's recent Schedule 10 filing.

9 E. A.A.C. R14-2-1604(A)(1):

10 The phrase "single premise" must be added after the words "non-coincident" to make  
11 this section consistent with A.A.C. R14-2-1604(A)(2).

12 F. A.A.C. R14-2-1604(A)(3); 1604(B)(4); 1604(C); 1607(D); and 1610(H):

13 These provisions all contain filing dates that have already passed (and thus are moot)  
14 and which are not necessary to understand other provisions of the Amended Rules and should  
15 accordingly be deleted.

16 G. A.A.C. R14-2-1606(D):

17 Staff's position in the PG&E Energy Services certification proceeding, Docket No.  
18 E-03595A-98-0389, requires that the following phrase be added after the colon in the second  
19 sentence of the section: "such tariffs may combine one or more competitive services within any  
20 other competitive service."

21 H. A.A.C. R14-2-1606(H)(2):

22 This provision is inconsistent with Staff's position in the PG&E proceeding, except  
23 as to distribution and other non-competitive services. Accordingly, the following language should  
24 be substituted: "The unbundled rates for Non-Competitive Services shall reflect the costs of  
25 providing the services."  
26

1 I. A.A.C. R14-2-1607(G):

2 To clarify that special contract customers are not automatically entitled to special  
3 benefits even after the expiration of their contracts, the word “tariffed” should be inserted before  
4 “rate treatment” as well as after the word “current” and before “rates.”

5 J. A.A.C. R14-2-1616(B):

6 As noted above, the Amended Rules fail to define or address “information services.”  
7 APS is apparently required to provide this service under Rule 1606(D) but at the same time  
8 prohibited from providing it under 1616(B). The Commission should delete all but the first  
9 sentence of Rule 1616(B), delete “by these rules or” from that first sentence, and delete Rule  
10 1606(D)(6). Further, the portion of this section allowing the customer to chose billing options is  
11 inconsistent with Staff’s position, that the ESP shall determine which of the available billing  
12 options would be employed.

13 K. A.A.C. R14-2-1618(B):

14 To conform to Staff’s position in the PG&E certification proceeding—that a “Load  
15 Serving Entity” only had to disclose information reasonably available to it and that with regard to  
16 (B)(4)-(6) a “don’t know” would comply with this provision—the words “to the extent reasonably  
17 available to the Load Serving Entity” should be added after the word “that”, and an additional  
18 sentence should be added that states: “If the Load Serving Entity does not know with reasonable  
19 accuracy the information listed above, it shall so indicate in its consumer information label.”  
20

## 21 XVIII. CONCLUSION

22 The Amended Rules cannot be realistically implemented as originally scheduled by  
23 the Commission. As presently drafted, they will only impede the introduction of meaningful retail  
24 electric competition. Further, the Amended Rules continue to exceed the Commission’s authority  
25 in many respects. The Amended Rules are also procedurally invalid and confiscate property  
26 vested in an Affected Utility. Finally, the Amended Rules impose arbitrary, unreasonable and